LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 29 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-442

JAY G. PHILPOTT, District Director of Internal Revenue, et al.,
Petitioners,
v.
VINCENT R. HILL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM F. FUITEN,
522 East Monroe Street
Springfield, Illinois 62701
Counsel for Respondent

ROBERT G. HECKENKAMP,
Of Counsel

SCHNEPP & BARNES, PRINTERS, INC., SPRINGFIELD, ILL.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions and Rule Involved	2
Statement of the Case	4
Argument	5
Conclusion	9

CITATIONS

Cases:

Boyd v. United States, 116 U.S. 616	7, 8
Entick v. Carrington, 19 Howell St. Tr. 1029	9
Gouled v. United States, 255 U.S. 298	7
Hill v. Philpott, 445 F. 2d 144	1
Marron v. United States, 275 U.S. 192	6
Schmerber v. California, 384 U.S. 757	5, 7
Stanford v. Texas, 379 U.S. 476	5, 6
Stuart v. United States, 416 F. 2d 459	7
Warden v. Hayden, 387 U.S. 294	5, 7

Constitution, statutes and rule:

Fourth Amendment	2
Fifth Amendment	2
18 U.S.C. 3103	2
18 U.S.C. 3103a	2

Miscellaneous:

Rule 41(b), Federal Rules of Criminal Procedure	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-442

JAY G. PHILPOTT, District Director of Internal Revenue, et al.,
Petitioners,
v.
VINCENT R. HILL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported *Hill v. Philpott,* 445 F.2d 144. The opinion of the District Court is reported *sub nom. United States v. Premises, 801 North Seventh Street,* at 310 F.Supp. 1316.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The only question considered by the Court of Appeals was that of Petitioner's privilege against self-incrimination (445 F.2d 144, at 146), or, whether the privilege against self-incrimination afforded by the Fifth Amendment extends to and protects against the seizure of a taxpayer's books, papers and documents, by search warrant issued under Rule 41(b) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Section 3103 of Title 18, United States Code, provides:

> Sec. 3103. *Grounds for issuing search warrant — (Rule).*

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

> Grounds prescribed for issuance of search warrant, Rule 41 (b).

Section 3103a of Title 18, United States Code, provides:

> Sec. 3103a. *Additional grounds for issuing warrant.* In addition to the grounds for issuing a warrant in

> Section 3103 of this title, a warrant may be issued to search for and seize any property that constitutes evidence of a criminal offense in violation of the laws of the United States. . . .

Rule 41(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) *Grounds for issuance.* A warrant may be issued under this rule to search for and seize any property
>
> (1) Stolen or embezzled in violation of the laws of the United States; or
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense;
>
> * * *

STATEMENT OF THE CASE

The Government's statement of the case is substantially correct, excepting that the statement contained in footnote 3, at page 6 of its Petition, that certain personal records were intermingled in the boxes containing Petitioner's financial records that were taken from the house, and, after being identified, were returned to the taxpayer, is unsupported by the record or by any evidence in this case.

ARGUMENT

I.

The position of the Government has been that once the validity of a search is established under the Fourth Amendment — and by that fact alone — the Fifth Amendment is not and cannot be violated. Having had the main thrust of this position turned back by the well-reasoned opinion of the Court of Appeals, the Government now concedes that the seizure of evidence of a testimonial or communicative nature may be subject to the privilege against self-incrimination under the Fifth Amendment, as specifically held in *Schmerber v. California,* 384 U.S. 757, and specifically excepted from the holding in *Warden v. Hayden,* 387 U.S. 294. But now, to avoid the obvious, the Petition for Writ of Certiorari seeks to carve out an exception by attempting to make a distinction between books and records which contain evidence of transactions and events, and books and records which contain opinions or beliefs of the possessor, such as diaries, personal letters, and the like.

The statement quoted by the Government in its Petition, from *Stanford v. Texas,* 379 U.S. at 485 n. 16 (Gov. Pet. p. 12), as being in a related context, is inaccurate. A book which is no more than a *ledger of an unlawful enterprise* might well stand on a different constitutional footing than other books and records of a taxpayer, but such statement can have no application to the facts here, for the records of the Respondent were not those of an *unlawful enterprise,* as said in *Stanford.* His keeping of the records in the manner that he did, which the Government contends was for the purpose of violating the Internal Revenue laws, did not make the practice of his profession as a

physician unlawful, nor was it shown that Respondent was in any way engaged in *any* unlawful business activity, which also sets apart the case of *Marron v. United States,* 275 U.S. 192.

The Court's attention is directed to footnote 3, at page 6, of the Government's Petition. As said in the Statement of the Case herein, the comment contained in said footnote is nowhere supported by the record or by any evidence in this case. The obvious purpose of this comment is to tailor the facts to avoid any inconsistency with the theory that the Government now advances.

Although this statement, that: "While some personal records were intermingled in the boxes containing Petitioner's financial records that were taken from his house, the personal material was properly identified and returned without copying . . .," is unsupported by the record and the evidence in the case, it does serve as the demise of the Government's argument that once the validity of a search is established under the Fourth Amendment, the Fifth Amendment cannot be violated because the Magistrate is interposed between the police and the privacy of the home. If the police can pick up records as promiscuously as the IRS agents did here (35 cartons, described by the agents as "truckload of books, records and paper") (Petitioner's Ap. 4a), and then screen out what is personal, to be returned to the owner, what then happens to the function or safeguard of the Magistrate?

Obviously there was no Magistrate to perform such screening operation, or distinguish between the personal records which the Government says were intermingled, and the financial records. And, clearly, the distinction cannot be left to the discretion of the officers *(Stanford v. Texas,* 379 U.S. 476; *Marron v. U.S.,* 275 U.S. 192).

Not only is the question of *who* is to make the distinction left unanswered, but the equally difficult question of *how* to make a distinction between a personal record and a business record is posed. A business record can be in words, or in figures; a personal record can be in the same context. A man's personal records can be his business records, and vice versa.

Nowhere can the Government find authority that the privilege against self-incrimination is limited to testifying or communicating solely as to opinions or beliefs of a man's mind. A record of past events is a testimonial of it and is no less communicative because it is in figures, rather than words. As the Court said in *Schmerber v. California,* 384 U.S. 757, at page 763, "It is clear that the protection of the privilege (Fifth Amendment) reaches an accused's communications, *whatever form they might take.*" (Italics ours)

Moreover, the Government concedes that a taxpayer's business records are the subject of privilege under the Fifth Amendment in the case of an Internal Revenue Service Subpoena for those records *(Stuart v. U.S.,* 416 F.2d 459). It now takes the position that these same records are distinguishable and not subject to the privilege where a search warrant issues for their production.

Warden v. Hayden, 387 U.S. 294, may have repudiated the "mere evidence" rule relied on in *Gouled v. U.S.,* 255 U.S. 298, but it did not disturb the basic holding of *Boyd v. U.S.,* 116 U.S. 616.

II.

The position of the Government that a search and seizure involves no disclosure, production or compulsion, as distinguished from a Subpoena or other process, while perhaps finding support in *Wigmore,* does not find support

in the cases decided by this Court. At the root of Professor Wigmore's reasoning can be found his purpose to give effect to the Fifth Amendment only as a rule of evidence; whereas, our founding fathers never intended it to be so limited, and this Court has construed it as a rule of substantive law in the many related opinions in which it has interpreted the principle in the 85 years since *Boyd vs. U.S.*, 116 U.S. 616.

III.

The further contention of the Government that the records in question are an "instrumentality" for effecting the crime of tax evasion, and not just "mere evidence," has an obvious and simple answer. Nowhere in the record does it appear that the books and records of the taxpayer were false or contained false entries, and the affidavit of the Government's agent establishes that the taxpayer did file income tax returns for the years in question. Therefore, if the crime of unlawful tax evasion was committed, the instrumentality, and the *sole* instrumentality, would have been the fraudulent, or false, income tax return. The books and records were kept as a part of the legitimate business of a practicing physician and were no more the instrumentalities of a crime than his surgical instruments.

Moreover, the *instrumentalities* of a crime were always considered the legitimate objects of a search warrant prior to *Warden v. Hayden,* and the adoption of Rule 41(b) of the Federal Rules of Criminal Procedure. Yet, we have no case or precedent holding that the books and records of a taxpayer are the instrumentalities of the crime of tax evasion.

CONCLUSION

The far-reaching consequences of upholding the Government's position should be considered. As said in the landmark case of *Entick v. Carrington,* 19 Howell St. Tr. 1029, "The power . . . is an execution upon all of the party's papers, in the first instance." Disclosure of the files and papers of a business or professional man should not be subjected to the whim of a disgruntled employee or the anxiety of an Internal Revenue Service agent to obtain information. If a society is to endure, its members must have basic and inalienable rights, among which are those afforded by the Fifth Amendment.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM F. FUITEN,
522 East Monroe Street
Springfield, Illinois 62701
Counsel for Respondent

ROBERT G. HECKENKAMP,
Of Counsel